No. 2 Misc.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA, Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES, Respondent.

ON PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION

MOTION FOR LEAVE TO FILE REPLY BRIEF
AND
REPLY BRIEF

Stephen S. Chandler,
United States District Judge
United States Court House
Oklahoma City, Oklahoma 73101
Petitioner,
Pro Se

Washington, D. C. THIEL PRESS 202 393 0625

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STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES, Respondent.

ON PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

MOTION FOR LEAVE TO FILE REPLY BRIEF AND REPLY BRIEF

Prior to oral argument I regarded this case as one which needed no oral argument. No material defense had been set up, jurisdiction of the court was found in the All-Writs Act, and all facts necessary to the granting of the relief prayed for were shown by the record. I still view the case in that light.

However, in view of the interest shown at the time of oral argument in the broad legal and constitutional ques-

tions involved, I respectfully ask leave to file this short paper for the purpose of emphasizing matters of more universal importance than the resolution of this specific controversy.

The judges of the Court of Appeals of the Tenth Circuit sitting in a dual role as a Court of Appeals *and* as a Judicial Council on various occasions during the past thirteen years, have usurped and exercised jurisdiction *sua sponte* in specific private cases pending in district courts. Usually those cases involved vast sums of money. The judges held evidentiary hearings without due process and even without hearing made findings of fact and entered writs and orders at various stages of the *trial* process affecting cases pending in the district courts of the circuit "to effectuate what seems to us to be the manifest ends of justice". Thus, district judges were effectually relegated to the status of subordinate trial examiners.

This statement is not an exaggeration. The power assumed by the judges of the Court of Appeals is virtually *unlimited*, as this paper will demonstrate. The judges of this statutory court of limited appellate jurisdiction have constituted themselves a court of general jurisdiction, usurped the statutory functions of the district courts and completely circumvented the policy of Congress in the establishment of these constitutional inferior courts.

This extreme condition exists in no other circuit. I shall refer later to the condition in other circuits by the citation of no less eminent an authority than Professor Charles Alan Wright, counsel for Respondent.

The original *sua sponte* order of the Judicial Council in the instant case is not more astonishing than the progressive steps leading up to the complete usurpation of this tyrannical power. A very few decisions and orders of the Court of Appeals and Judicial Council of the Tenth Circuit will be sufficient to show the erosion of the independence of the district judges by the usurpation of power and jurisdiction to control or exercise *all* or *any* of their discretion-

ary acts at *every stage* of the trial process by what may factually be characterized as the "Tenth Circuit Double-Barreled Defamatory Supervisory Writ" which was concocted by the combination of four nonexistent jurisdictional powers: the nonexistent "supervisory" power vested in judicial councils by 28 U.S.C. 332; the nonexistent "appellate supervisory control of the district courts"; the nonexistent "*inherent* powers of appellate jurisdiction to effectuate what seems *to us* to be the manifest ends of justice"; and the nonexistent jurisdiction "to take action to guarantee a fair and impartial trial."

The decisions and orders of the Tenth Court of Appeals and Judicial Council referred to are not just remotely applicable to the instant case. They are an integral part of it, made so by specific reference thereto as the basis for the issuance of the order under attack here. The full significance of the unprecedented order under consideration in the instant case will be overlooked unless the similar writs and orders in these few closely related cases are clearly understood with the aid of a careful scrutiny of the briefs and records in the cited cases, *which are all on file in this court*, in each of which certiorari was unfortunately denied, thus delaying by many years the resolution by this Court of the vital questions involved here.

Greater by far is the judicial significance of each of these related cases than the Council order in the instant case which, in retrospect and in comparison, seems somewhat laughable. It is merely the proverbial straw that broke the camel's back. In each of the other cases the result to the private litigants was a miscarriage of justice and a monumental misuse of the judicial process.

The bellwether case is *United States v. Ritter*, 273 F.2d 30, 32 (C.A. 10, 1959), cert. den. 362 U.S. 950, 4 L.Ed.2d 869, 80 S.Ct. 863 (1960) and its Companion case, *Ritter v. Murrah*, 362 U.S. 946, 4 L.Ed.2d 866, 80 S.Ct. 873 (1960), the history of which is as follows:

In 1955 in *United States v. Hatahley*, 220 F.2d 666, the Court of Appeals reversed Chief Judge Ritter of Utah.

Certiorari was granted, *Hatahley v. United States*, 351 U.S. 173, 100 L.Ed. 1065, 76 S.Ct. 745 (1956). This Court reversed the Court of Appeals and remanded the case to the district court for the making of appropriate findings with reference to damages. In its opinion this Court stated, 351 U.S. page 177, 100 L.Ed. page 1072:

> "3. While the Government does not challenge particular findings, it does level a general charge that the trial was conducted in such an atmosphere of bias and prejudice that no factual conclusions of the court should be relied on. *The Court of Appeals noted 'that the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality.'* 220 F.2d, at 670. After oral argument and *a thorough consideration of the record*, however, we do *not* find that the trial was conducted so improperly as to vitiate these findings."[1]

Upon remand the district judge took additional evidence, made findings of fact and entered judgment for damages. The United States again appealed to the Court of Appeals, *United States v. Hatahley*, 257 F.2d 920 (1958). The Court of Appeals found the damages awarded unsupported by the evidence and remanded the case for a new trial stating:

> "From his *obvious interest* in the case, illustrated by *conduct and statements made throughout the trial*, which need not be detailed further, we *are certain that the feeling of the presiding Judge* is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside. * * * we *suggest* that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge. See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259, 77 S.Ct. 309, 1 L.Ed.2d 290."

[1] Italics herein added if not otherwise noted.

Judge Ritter was not intimidated by the gratuitous "uncomplimentary" statements of the Court of Appeals and its "suggestion" that he "step aside". He refused to abdicate his duty to exercise his jurisdiction as his conscience dictated. As stated by the Court of Appeals, 273 F.2d 32, he "took note of our suggestions that the case be heard before another judge but stated for the record that he did not 'intend to follow that suggestion so you can lay that to one side'." ("Supervisory suggestions" have at times also been made *orally* to district judges in the Tenth Circuit.

The United States thereupon filed an *original* Mandamus Action in the Court of Appeals, *United States v. Ritter*, 273 F.2d 30 (1959) to disqualify the judge for bias and prejudice. (No attempt was made to disqualify him in the district court for *personal* bias and prejudice in compliance with 28 U.S.C. 144.) Judge Ritter filed no response and did not appear either in person or by counsel, but counsel for the parties in interest appeared and resisted the Application. The Court of Appeals issued a Writ prohibiting Judge Ritter from proceeding further in the case and providing that the Chief Judge of the Circuit designate another Judge (one he would choose) to hear the case. In this connection the Court of Appeals said on page 32:

> "[1] Plaintiffs in the *principal* case take the position that the government's application is premature and untimely, and that in any event, extraordinary relief is unauthorized either under the all-writ statute, Section 1651, Title 28 U.S.C., or *appellate supervisory control* of the district courts. But we have *no doubt* of our *power and inescapable duty* to grant the relief sought, whether it be found in the all-writ statute or in the exercise of the *inherent* powers of appellate jurisdiction to effectuate what seems *to us* to be the manifest ends of justice. See *La Buy v. Howes Leather Co.*, supra."

The Judges of the Court of Appeals who were sitting *en banc* when this unauthorized Extraordinary Writ was

entered, immpediately put on their other hats and, as members of the Judicial Council *ex officio*, entered an identical Extraordinary Writ which they called an "Order". As stated in the Memorandum of Respondents filed in the *Companion* cases No. 761 and No. 823 Misc., October Term 1959, *Ritter, Chief Judge v. United States*, 362 U.S. 950, 4 L.Ed.2d 869, 80 S.Ct. 863 (1960) and *Ritter, Chief Judge v. Murrah, Chief Judge*, 362 U.S. 946, 4 L.Ed.2d 866, 80 S.Ct. 873 (1960):

> "*Immediately* after consideration by the Court of Appeals, the matter was further considered by the Judicial Council of the Tenth Circuit, convened pursuant to 28 U.S.C. 332. The order of the Council *found* (Pet., No. 823, Misc., p. 2a) that Judge Ritter has '*such bias and prejudice* * * * that he should proceed no further' in the case, and that *the 'effective and expeditious administration of the business of the District Court requires that the matter be heard by another judge.* The order of the Council directs (id., p. 3a) that Judge Ritter proceed no further in the case, and it requests the Chief Judge of the Circuit to designate and assign another judge from the District Court's bench."

Thus was whelped by the Judges of the Court of Appeals for the Tenth Circuit, acting *ex officio* as members of the Judicial Council, *their* new *double-barreled* jurisdiction. They thereby "legislated" to themselves complete and unlimited power and jurisdiction to "suggest" how a district judge should exercise his discretion in the trial of specific private litigation and if he will not bend to their will, the power to themselves exercise his discretionary function by the entry by the Court and Council jointly of the new "double-barreled" writ which they had just devised to replace him with another judge "hand-picked" by the Chief Judge.

There is no authority of law which authorizes the hand-picking of a successor district judge by the Chief Judge of the Circuit when a district judge becomes disqualified to

hear a case which has been regularly assigned to him under the rules of the district court made pursuant to Title 28 U.S.C. 137. The successor judge can legally be designated only as provided by the district court rules. Title 28 U.S.C. 292(b) is not applicable. A judge of another district assigned to hold court in a foreign district serves under the rules of the district court to which he is assigned. This practice in the Tenth Circuit is another arbitrary usurpation of power, dangerous in its implications.

In *Ritter* the Court of Appeals in an *original* action filed in that court made *findings of fact* of bias and prejudice without due process or competent evidence and in plain words said that it made no difference whether it had jurisdiction under the All-Writs Statute because it could enter the Extraordinary Writ "in the exercise of the *'inherent' powers of appellate jurisdiction* to effectuate what seems *to us* to be the manifest ends of justice", (citing *La Buy*). This Extraordinary Writ was entered by the Court in an *original* action filed in the Court of Appeals to disqualify a district judge for *bias and prejudice* in a specific action pending in a district court in which the district judge was *then* actually sitting. From the opinion of the Court of Appeals, it would appear that the matter was before the Court *on appeal.* But it was not. The Writ was entered in *original* action number 6238 in that court, whereas the judgment of reversal with the *"suggestion"* that the district judge "step aside" had been entered seventeen months earlier in appeal number 5717.

The *Judicial Council*, to complete the "double-barreled" legal maneuver, also made *findings* of bias and prejudice *without hearing* and issued its *Companion* Writ *sua sponte* "pursuant to the power and authority of the Judicial Council under the Act of June 25, 1948, c. 646, section 332, 62 stat. 902, 28 U.S.C. 332", *not reported,* but see Appendix to Chief Judge Ritter's Petition for Writ of Certiorari or Mandamus, No. 823 Miscellaneous, October Term 1959, supra.

Congress has neither directly nor indirectly authorized authorized Courts of Appeals or Judicial Councils to disqualify district judges for bias and prejudice or for any other reason. It has been very sparing in granting the right and has strictly limited the right to do so to litigants who file an affidavit of *personal* prejudice and comply strictly with other specific requirements of the statute, 28 U.S.C. 144. (The legislative history of the section reveals that Circuit Judges have vigorously opposed amendment of the Act to permit disqualification by the parties of Circuit Judges for bias and prejudice.)

In *Ritter* there was no affidavit filed as required by 28 U.S.C. 144. The party to the action filed an *original* action in the Court of Appeals for a writ disqualifying the trial judge for *bias and prejudice.* Yet the new double-barreled writ entered both by the Court and Council accomplished the impossible by effectively "repealing" Section 144 by the combined use of its "*inherent* powers of appellate jurisdiction", that it seemed to them to constitute a Congressional district courts" granted by Section 332.

The plain Congressional limitation and the clear adjudication thereof by this Court did not raise difficult hurdles for the Court of Appeals and Judicial Council of the Tenth Circuit. They read into the benign provisions of Section 332 a blanket grant of "appellate supervisory *control* of the district courts". Indeed, a grant so clear and explicit, when combined with their self-assumed "*inherent* appellate jurisdiction" it seemed to them constituted a Congressional mandate causing them to "have *no doubt* of our *power* and *inescapable duty* to grant the relief sought whether it be found in the all-writ statute or in the exercise of the *inherent* powers of appellate jurisdiction to effectuate what seems *to us* to be the manifest ends of justice." *Ritter,* 273 F.2d 30, 32 (1959).

Ritter was soon followed by *Occidental v. Chandler,* 303 F.2d 55, cert. den. 372 U.S. 915, 9 L.Ed.2d 722, 83 S.Ct. 718 (1963), pet. for reh. den. 373 U.S. 906, 10 L.Ed.2d

201, 83 S.Ct. 1288 (1963) where the court of appeals *sua sponte* in an *original* mandamus action filed in that court where it had no jurisdiction whatever, changed the issues, took evidence for three days, tried the district judge for *fitness* without due process, found extreme *bias and prejudice* and unfitness where none existed, and entered a genuine double-barrelled *defamatory* supervisory writ prohibiting the judge from proceeding further in a large bankruptcy reorganization case upon which he had spent months of time and in which every original creditor and stockholder and the Securities & Exchange Commission opposed the entry of the writ. The court *sua sponte* arbitrarily held it to be an "exceptional" case, which it was not, citing *Ritter* as authority for its action but significantly *omitting* the apparently embarrassing words *"to us"* and replacing them with three stars. The court said:

> "[1] The jurisdiction of this court is questioned on the ground that a ruling on a motion for disqualification made under 28 U.S.C. § 144 is reviewable only on appeal and that the All-Writs Statute, 28 U.S.C. § 1651, does not apply. The facts alleged and proved establish this case as an *exceptional case* in which the preservation of the right to fair and impartial hearing and disposition requires the exercise of our jurisdiction at this time. The question of the disqualification of a trial judge was presented in *United States v. Ritter*, 10 Cir., 273 F.2d 30, 32, and we held that we have the *'power and inescapable duty'* to act and that it makes no difference whether such power is conferred under the All-Writs Statute or under the inherent powers of a United States Court of Appeals 'to effectuate what seems * * * to be the manifest ends of justice.' Application to the United States Supreme Court for relief from our action in the *Ritter* case was denied. *Ritter v. Murrah*, 362 U.S. 946, 80 S.Ct. 873, 4 L.Ed.2d 866."

The *Ritter* double-barrelled procedure was then followed by the court, again sitting *en banc*, immediately resolving

itself into a Judicial Council and shooting the other barrel pursuant to authority claimed to be vested in the Council by Section 332.

In *Occidental* the Circuit Judges went even further in their punitive findings than they did in *Ritter*. They *defamed* the district judge by statements of half-truths which they knew to be false, imputing *dereliction* and *dishonor* as they did in the Council order in the instant action. In *Ritter* findings of "obvious" interest and gross incompetency had been used by the court and Council to castigate and belittle the district judge.

The next use of the double-barreled defamatory punitive writ was in *Texaco v. Chandler*, 354 F.2d 655, C.A. 10, 1965, cert. den. 383 U.S. 936, 15 L.Ed.2d 853, 86 S.Ct. 1066, a *Companion* case to the instant action. The Writ of Prohibition in *Texaco* was issued by the Court of Appeals on the same day that the original Council Order was entered in the instant action, *Texaco* being one of the 163 cases at which the Council order was directed. In *Texaco* the Court cited both *Ritter* and *Occidental* as authority for its action.

Historically, the power first usurped in *Ritter* was snowballed into virtual power of impeachment by the judges of the Court of Appeals when sitting *en banc* in *Texaco* and immediately resolving themselves into a Judicial Council, shooting the *other* barrel in *Texaco* and then, claiming to be acting *only* in their capacity as a Council and shooting only the "administrative" barrel when finding a district judge *unfit* to sit in *any* case from which action they *now* claim there is *no* right of review by this court because the Council is an adminsitrative agency. Thus, except for *Texaco*, the Council Order here is a single-barreled multiple writ directed at the remaining 162 cases.

In *Texaco* the Court of Appeals did not even give the trial judge an opportunity to pass on the motion filed in the *district* court seeking his disqualification. The Court and Council *actually exercised* the trial judge's discretionary

exclusive function to determine whether he should "in his opinion" under Section 455 disqualify himself.

Thus have the judges of the Tenth Court of Appeals and Judicial Council effectively arrogated unto themselves *unlimited* general original jurisdiction over *every case* pending in the *district courts* of six states from the moment they are filed with the district court Clerk. And this has been the Federal law of the six states of the Tenth Circuit since 1959.

The usurpation of this power and jurisdiction may have been suggested or at least encouraged by a strange sentence appearing in *La Buy*, 352 U.S. 249, 1 L.Ed.2d 290, 77 S.Ct. 309 (1957) where it is stated by Mr. Justice Clark in the last paragraph of the opinion that:

> "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system."

Since it was used as "the entering wedge", the Court may wish to review carefully the decision in the light of the questions raised here.

The extension of the All-Writs Act to cases other than those in which a court has exceeded or refused to exercise its jurisdiction or in which appellate review will be defeated if a writ does not issue is fraught with danger. The temptation for Courts of Appeals to *arbitrarily* find "clear abuse of discretion" and "exceptional circumstances" seems irresistible. Too often writs have been arbitrarily issued under one plausible guise or another when a careful analysis will disclose the writ to be "supervisory" in nature.

It is assumed that neither the Congress nor this Court is aware that their clear enunciations have been thus so openly and arrogantly nullified since to one who was not a district judge in the Tenth Circuit and watched the game from his ringside seat this complete distortion of the judicial process may not actually have been noticeable. Hence the need for the filing of this paper. But the "old timers", those who were privileged to serve several years as *inde-*

pendent trial judges of general original jurisdiction before 1948 when the *scheme* gained momentum and new words were surreptitiously slipped into Section 332, know from experience that "supervision" is a bad word and means improper meddling in their cases at the trial level by appellate judges avid for power.

The Circuit Judges now are able to "suggest" specific discretionary decisions to district judges and if the district judges cannot be politely coerced into "cooperating" with those who would "supervise", the new double-barreled writ is available to compel acquiescence and defame them. 362 U.S. 946, 4 L.Ed.2d 866.

In order to get by with such clear usurpation of power it was necessary for the Judges to justify their unlawful acts. They did so by making it appear that the "unseated" judge had an improper interest in the case, by the use of paternal phrases, and by couching findings based on no competent evidence in such flagrant half-truths as to make it appear falsely to the public eye that the district judge was incompetent, derelict or corrupt and that the end justified the means. And they did not hesitate to avail themselves of this unwholesome strategy of character assassination. The trial judge in each instance was gravely discredited by the issuance of a clearly punitive defamatory Writ and Order.

The Circuit Judges of the Tenth Circuit have already cut this shabby pattern and reduced the district judges of the Circuit to the status of subordinate trial examiners. The whole Congressional plan of separate trial and appellate courts has been circumvented and destroyed by usurpation by the Circuit Court and Council of District Court functions thus dangerously concentrating both original and appellate jurisdiction in that one court.

This case furnishes a vehicle in which this court can avail itself of the opportunity to speak and restore Constitutional government in the Tenth Circuit.

It is no more a proper *function* of appellate judges to supervise the *administration* of a trial court that it is for trial judges to supervise the administration of appellate courts. It is their statutory *appellate* function to administer their own courts and review *final* decisions of district courts. It is not their proper function to tamper in any way at the trial stage with the *work* (administration) or discretionary judicial decisions of the trial judges. It is their *limited* function to review only the final orders of trial judges.

Other Circuit Courts now review the size of jury verdicts, set them aside as against the weight of the evidence, substitute their judgment for that of trial courts when findings are based on documentary evidence, try cases *de novo* where the findings of fact are clearly based on conflicting testimony and, not content with this, they also use Extraordinary Writs to control the discretionary acts of District Judges.

No better authority should be needed than the erudite article by *Professor Charles Alan Wright* published in *41 Minnesota Law Review 751 (1957)* entitled *"The Doubtful Omniscience of Appellate Courts."* To his everlasting credit and honor he paints the picture vividly, shows each of the four practices to be clearly unconstitutional, convincingly shows each to be destructive of the judicial system and inimical to the effort being carried on then and now to improve the judicial system. There are appended hereto for the convenience of the Court, thirteen copies of this article and of an equally important and pertinent article by Judge Merrill E. Otis, U.S. District Judge for the Western District of Missouri from 1925 to 1944 on the constitutionality of *"schemes"* to create tribunals to try federal judges, entitled "A Proposed Tribunal: Is It Constitutional?" published in Volume 7 of The University of Kansas City Law Review, page 3.

It is sincerely believed that a careful study of the splendid article by Professor Wright referred to above is

necessary for a complete understanding of just what has happened to our judicial system generally since the writer of this paper became a district judge. To one at the trial level who has seen it at first hand, the havoc wrought is clear and frightening.

The members of this Court occupied with problems seemingly of more general importance could not have been fully aware of the tyrannical usurpation and abuse of power by the judges of the Tenth Circuit at the time certiorari was denied in *Ritter, Occidental* and *Texaco* or the Circuit Judges would at that time have been confined to a lawful exercise of their *statutory* limited appellate jurisdiction. Nor would these cases have been cited as precedents in *Cascade Natural Gas Corporation v. El Paso Natural Gas Company, et al.*, 386 U.S. 129, 17 L.Ed.2d 814, 87 S.Ct. 932 (1967) had this Court been aware of the fact that the trial judges were *not personally or emotionally involved* and had been *falsely* defamed by the Circuit Judges of the Tenth Circuit without jurisdiction or due process hearing.

The effect of the citation of these cases in *Cascade* was devastating. The Court of Appeals of the Tenth Circuit jubilantly considered this as approval of their unconscionable decisions in those cases. A few days after the decision in *Cascade* when the jurisdiction of the Court of Appeals to enter the Writ in *Chandler v. United States* (Burbridge), 389 U.S. 568, 19 L.Ed.2d 777, 88 S.Ct. 691 (1968) was challenged at oral argument, a judge of the Court smugly stated from the bench "We can now do anything we want to do" which is as accurate a statement of the power that Court claims and has for thirteen years arbitrarily exercised as should be needed.

It should now be apparent that the Council Order in the instant case stripping the district judge of all power is not as inimical to the independence of district judges as the threat of the asserted right to *sua sponte* summarily strip a district judge of power in specific cases at any moment in the preliminary stages or actual trial without due process

and to prohibit him from proceeding further by reason of any discretionary order he has entered in the case before or during trial. And in the Tenth Circuit the district judge knows what to expect if he does not agree. He must have in mind at all times that if he fails to follow "suggestions", *oral* or written, he can expect to be ordered to "step aside" and to be castigated, belittled and defamed as well.

It is hoped that this paper will expose the arbitrary usurpation and raw and injudicious exercise of this tyrannical power in the Tenth Circuit which concentrates all judicial power in the Circuit Judges sitting as a Court or as a Council, makes them the final arbiters in private litigation which constitutes most of the judicial business in six states since these cases are so seldom accepted for review by this Court. But it will be necessary to study *Ritter, Occidental* and *Texaco* to see the shocking picture clearly and understand the deep concern of the writer and others who know the facts. When these facts are known it is thought that neither the public, the Congress, nor this Court will tolerate its continued existence.

These are not isolated cases where the Judges of the Court of Appeals of the Tenth Circuit have arbitrarily usurped the discretionary functions of a trial judge. Such punitive and indefensible conduct has now become usual. If this course of injudicious and tyrannical conduct is not longer to be tolerated this Court must act. Both constitutional and statutory safeguards have been obliterated in six states. We now live without due process and without an independent Federal trial judiciary. The foundation of our freedom is gone.

The complete change of *function* of judges wrought by the usurpation of district court power by Courts of Appeals can be understood only if this court sees fit to study the records in *Ritter, Occidental, Texaco* and Professor Wright's article. The action of the Council and Court in each case was drastic, arbitrary, highly punitive, defamatory, unjustified by the facts and not in the interest of justice. The

records in these cases reveal this and the danger lurking in any kind of appellate supervision of trial judges.

To furnish only one flagrant example of trial *de novo* in the Tenth Circuit, the court is invited to read the record and briefs in *Neely v. Houston Oilers*, cert. den. 385 U.S. 840, 17 L.Ed.2d 74, 87 S.Ct. 92 (October 10, 1966), reh. den. 389 U.S. 942, 17 L.Ed.2d 224, 87 S.Ct. 285. In *U.S.D.C.-W.D. Oklahoma v. Lutes*, 371 U.S. 941, 9 L.Ed.2d 275, 83 S.Ct. 320 (1962); same case below, 306 F.2d 948, 308 F.2d 574, reh. den. 371 U.S. 970, 9 L.Ed.2d 540, 83 S.Ct. 550; and *Chandler v. United States (Burbridge)*, 389 U.S. 568, 19 L.Ed.2d 777, 88 S.Ct. 691 (1968). Mandamus issued below *by minute order only*, writs were arbitrarily issued in specific cases without jurisdiction.

In *Lutes* the Court of Appeals substituted its judgment for the discretionary order of the district judge staying temporarily the trial awaiting an *early* decision by the Supreme Court of Okoahoma on an important question of substantive oil and gas law not theretofore determined by the State Court. It was later determined by the Oklahoma Supreme Court contrary to an earlier circuit court ruling, *Rogers v. Westhoma*, 291 F.2d 726 (see dissent by Judge Bratton).

In *Neely* the Court of Appeals tried the case *de novo* and set aside findings of fact based on conflicting oral testimony, made its own findings directly contrary to the admissions in open court of the appellant, and in the opinion reversing the case snidely suggested that the trial judge was "irrational".

Neely and *Burbridge* were decided since the pendency of the instant action; *Lutes* prior thereto, but the records and briefs would make highly interesting and profitable reading for any member of the court who thinks that the great principles involved in this case justify finding out just what has been going on out on the frontier while this court has been so busy it could not review by certiorari these cases that appeared to affect no one but the parties involved.

The national effort to preserve our institutions is no more important in any area than the restoration of respect for the Constitution and laws of this country. This court should curb the Circuit Judges who have "legislated" themselves virtually *limitless* power to enforce their whims, brazenly thwarting the teaching of this Court and Congressional limitations of their jurisdiction.

In *Ritter, Occidental, Texaco* and the instant case it should not be overlooked that there were very serious violations of legal and judicial ethics, and also a grave *moral* issue–false character assassination.

The Justices of the Supreme Court, the Judges of the Courts of Appeals and the District Courts are all Constitutional judges serving "during good behavior" with the *sole* power to shorten their life tenure vested in the Congress. Courts of Appeals and District Courts are "inferior" courts with only such jurisdiction as is *specifically* granted to them by the Congress.

The United States Courts of Appeals, except in the four specific instances involving certain interlocutory orders set out in 28 U.S.C. 1291, "have jurisdiction of *appeals* from all *final* decisions of the district courts of the United States * * *" 28 U.S.C. 1291. This is the full extent of the jurisdiction of the Courts of Appeals insofar as their *functions* pertain to the activities of district courts and judges.

Some 400 district judges sit alone, each judge constituting a trial court of original jurisdiction whose statutory *function* is to try and determine controversies, to hear evidence, find the facts, apply the law and enter final judgments.

Congress has never granted to the Supreme Court jurisdiction to supervise the "inferior" courts, nor has it granted to the Courts of Appeals jurisdiction to supervise the District Courts. Courts of Appeals and District Courts have separate and distinct, entirely different, *functions*. Each is

supreme in its own sphere. The functions do not and cannot overlap at any point without completely shattering the dual system of courts of original and review jurisdiction. Intervention by the Court of review in any manner at a point prior to final judgment puts the cart before the horse, and not only frustrates the system but destroys it.

Nor have Courts of Appeals power to *increase* their jurisdiction by claiming "inherent" power to do so. "Inherent" power comes into play only when clear jurisdiction over the subject matter is already present, and then for the sole purpose of implementing an already vested jurisdiction. There is no such judicial vehicle as "inherent power" to create or enlarge jurisdiction. That is tyranny!

The Constitution imposes exclusively on the Congress the power and duty to police the judiciary. This is one of the cardinal checks and balances and is a power and duty which the Congress cannot constitutionally delegate to any other person or Governmental body. It naturally follows that the Congress cannot delegate this police power over the judiciary to *the judiciary itself* and specifically and especially cannot constitutionally delegate it to any judge or court of the judiciary. To do so would constitute abdicating its constitutional duty to exercise the power itself which duty is necessarily implied from the exclusive grant of power.

Every individual judge of the judiciary, no matter on what court he sits, is himself subject to the congressional power of impeachment. He, himself, has not the power, whether designated judicial or administrative, to inquire into the fitness of any other judge, because that power and duty to sit as a court and try the fitness of any and every member of the judiciary is, by the Constitution, exclusively and solely vested in the United States Senate, sitting as a *Court.* The Congress cannot constitutionally *permit* the judiciary to police itself nor can it side-step its own duty to do so.

By the same token the Congress cannot constitutionally permit any *part* of the judiciary to exercise police power over any other part, any court or body composed in whole or in part of judges, or any judge to exercise police power over any other court or judge.

Nor can any court, body of judges, or any judge legally, constitutionally or *ethically* seek, accept or exercise this exclusive congressional function.

To delegate the power or any part of it to any judge or court of the judiciary, whether designated a judicial or administrative agency, under guide of the power to supervise in any way, assist in "housekeeping" or "housecleaning" or inquire into the fitness of any member of the judiciary, would be equally unconstitutional for the additional reason that such a delegation of power, even if reciprocal, would constitute class legislation, violative of the equal protection concept.

And how would the judges who espouse the supervision of district judges enjoy being supervised by district judges if the provisions for supervision were made reciprocal? With the shoe on their foot, they would at once see how laughable is the very thought that any judge *can* be supervised. In seeking power for themselves they have not sought reciprocity and have objected to district judges sitting on Judicial Councils on the theory that there should be a "chain-of-command", a difference of importance status between circuit and district judges. This paternal attitude of some Circuit Judges apparently blinds them to the fact that there might actually at this moment be an active circuit judge who is lazy, senile, arbitrary, mentally incompetent, alcoholic, emotionally unstable, too ambitious, tyrannical or even corrupt and that they themselves might ba a judge who should "step-aside".

Of course Circuit Judges may *properly* assume that it is one of the primary duties of a circuit judge to supervise *himself*, but apparently they have never thought of that nor *properly* assumed that it is not only the duty but the *right*

of every district judge to supervise himself. This is the kind of self-supervision which is implicit in the wholesome and rational constitutional concept of an entirely independent judiciary: each judge answerable to no man, subject only to the limited impeachment power of the Congress and the criminal laws of the land. 18 U.S.C. 201.

No judge is properly a judge of the qualifications of his associates. He is exclusively a judge of legal controversies. His only police power over any judge is over himself. When his critical judicial eye looks other than inward it is off the ball and there is grave danger that he is neglecting his official duties. It is obvious that he is neglecting to police his own house where his most precious treasure is stored.

The framers of the Constitution knew that complete judicial independence was vital; that the kind of judges they envisioned *could* not and *would* not be supervised; that any sort of supervision would be evil; that it would destroy the very concept of independence; and that supervision would not be needed. They circumscribed it very, very carefully and effectively prohibited it by limiting it, in effect, to corruption in office.

CONCLUSION

The following statements are made as constituting the hopefully dispassionate thoughts of a trial judge with reference to the questions which seemed to interest the Court at oral argument.

If a Judicial Council is an administrative agency vested by the Congress with any supervisory power over judges, assuming that the Congress can constitutionally delegate any such power, it is an agency of the Legislative Branch, not the Judicial Branch, and would be subject to the Administrative Procedure Act which provides for appeal and review. *5 U.S.C. 701 et seq.*

The Congress has not vested any supervisory *power* over judges either in the Judicial *Conference* of the United

States nor the Judicial *Councils*. It could not constitutionally do so. Very carefully has the power to enforce been omitted from the Acts creating these bodies. They have only the "power" to "*suggest*", which has been used as a sword of Damocles over timid judges as a form of coercive "persuasion".

In the instant case the Council "cut and ran" when the district judge ignored its invalid Order and continued to exercise his judicial power. If the Council had thought it had the power to enforce its order it would unquestionably have done so. And it should be noted as significant that although the Act creating the Judicial *Conference* of the United States does not intimate that it has power (it has only duties), that the Report on the Powers and Responsibilities of the Judicial Councils (H. Doc. No. 201, 87th Cong., 1st Sess. (1961)) attached by Professor Wright to his brief, shows that the Judicial Conference of the United States expresses the gratuitous opinion that supervisory power is vested in Judicial Councils. The very act of having the Report promulgated and approving it constitutes an attempt to bolster the power unlawfully claimed by Judicial Councils by expressing an uncalled-for judicial opinion encouraging the usurpation of power by Judicial Councils. No finger can point to a congressional grant of such power. This is an attempt to exercise unauthorized power by clever use of its prestige.

There is untold evil in the mistaken idea that supervision of federal judges is desirable or at all possible. The havoc that has already been wrought upon the orderly operation of the judicial system by the attempted usurpation of such power by Judicial Councils is great.

The creation of Judicial Councils of the circuits, 28 U.S.C. 332, was proposed and relentlessly promoted by appellate judges. The legislative history discloses that they did not originally seek supervisory power over district judges. They advised Congress that Section 332 did not need "teeth", power to enforce; that their suggestions

(directions) would be sufficient for the purpose expressed in the Act—"in the interest of uniformity and expedition of business", "to the end that the work of the district courts shall be effectively and expeditiously transacted". They thought this would be a sufficient sword of Damocles to hold over the heads of district judges. They were also of the opinion that power to enforce would make the Act unconstitutional and would arouse the indignant opposition of district judges.

But a few circuit judges even then wanted Section 332 so worded that it could be used as an "inducement" to obtain compliance by district judges with their suggestions and hence the word "directions" in the 1939 Act instead of "suggestions" as used in the Act creating the Judicial *Conference* of the United States, now 28 U.S.C. 331, with "orders" stealthily substituted for "directions" in 1948.

There were many in 1939 who thought the creation of Judicial Councils, Section 332, unnecessary and a duplication of the function of the Judicial *Conferences* of the circuits. It should be noted that Section 331 creating the Judicial Conference of the United States composed of the Chief Justice and the Chief Judges of the Circuits provides:

> 'The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit *suggestions* to the various courts, in the interest of uniformity and expedition of business."

and that Section 333 creating the Judicial *Conferences* of the Circuits composed of all of the circuit and district judges of the circuit provides:

> "For the purpose of considering the business of the courts and *advising* means of improving the administration of justice within such circuit."

These were both entirely wholesome provisions. There was no suggestion of coercion or supervision in either

Section 331 or 333 and they fully accomplished the stated purpose of judicial councils which was:

> "To the end that the word of the district courts shall be effectively and expeditiously transacted * * * It shall be the duty of the district judges promptly to carry out the *directions* of the council as to *the administration* of the business of the courts."

It should be apparent that when created the Judicial Conference of the United States and the Judicial *Conferences* of the Circuits were benign and useful tools devised for the purpose of submitting "*suggestions* to the various courts, in the interest of uniformity and expedition of business" (Section 331) and "for the purpose of considering the business of the courts and *advising* means of improving the administration of justice within such circuit" (Section 333).

But Section 332 creating Judicial Councils, although fortified with no enforcement power, originally contained two noxious words "shall" and "duty" devised by chief circuit judges who then (as now in actuality they control the Judicial Conference of the United States) constituted the Conference of Senior Circuit Judges.

That the sword (Judicial Councils) was then intended to be used only as a *gentle* threat does not lessen the nature of the tactic which is unworthy of attempted use by Circuit Judges to enforce their will upon a district judge who has the legal *right* and moral *duty* to make his own discretionary decisions in the *administration* of his own court as he does to make his own discretionary decisions in the entry of judicial orders.

Both Sections 331 and 332, Title 28 U.S.C., are unconstitutional if construed to grant to the Judicial Conference of the United States or to Judicial Councils any power whatever to supervise *either* the *judicial* or *administrative* acts of a district judge by the entry of *any* kind of an *enforceable* order affecting *the administration* of the busi-

ness of a district court or *any* judicial function of a district judge.

The statutory provisions of Section 137, Title 28 U.S.C., were not activated in the instant case by a bona fide disagreement of the district judges and a certification of the dispute by a district judge to the Judicial Council for resolution. Even had these statutory requirements been met it would have given the Council no power to enter any *valid* and enforceable order affecting either pending or new cases of a district judge. This section is unconstitutional to the extent that it purports to grant to circuit judges power to interfere in the *administrative* affairs of a district court and enter an enforceable order regarding the division of new cases, even though by the terms of the statute the power is not activated except upon request of a district judge in the event of a disagreement. This would constitute an *original* justiciable *controversy* requiring due process and trial and would not be *appellate* in nature. A Judicial Council is not vested with either original or appellate *judicial* power to adjudicate the controversy. The same is true with reference to 28 U.S.C. 372(b) hearing and 11 U.S.C. 62(b) removal of Bankruptcy Referees for cause which latter section conflicts with the power granted district judges by 28 U.S.C. 756. All other sections purporting to give Judicial Councils any power whatever are also unconstitutional.

It is not a proper *function* of a judge or judges of an appellate court to meddle in the discretionary administrative affairs of the judges of the trial court or to "help" the trial judge try the cases which it is their function to review. To do so impairs the independence of that judge or court and Congress has never granted any such power, if it could.

Although Congress has not intended to abridge the independence of District Judges by granting to a judge or to judges of appellate courts the right to supervise in any manner in the administrative affairs of a trial court of original jurisdiction it would not seem to have the constitutional power to do so. For example, Sections 332 and 137

of Title 28 U.S.C., if so construed, constitute *class legislation.* All "during good behavior" judges are not affected equally nor is the statute reciprocal. Some judges are given greater burdens and some judges' rights are restricted in violation of the equal protection clause of the Constitution.

The insidiousness of these sections has been obscured by the seemingly wholesome concept that the judiciary should police itself. But the concept has been misconstrued. While it is true that the judiciary *should* police itself and keep its own house clean, this does not mean, as has been mistakenly supposed, that one judge or set of judges should police another judge or another set of judges. The concept that the judiciary should keep its own house clean can only mean that *each* one of the 500 Federal Judges should keep his own house clean, *not* the house of his judicial brother. It means that he should tend to his own business with great care. If he does this well he will find it a full-time job. A judge's conscience is strictly a personal matter and cannot be tampered with (supervised) by another judge or set of judges. If he is a trial judge he should not be tampered with by judges of a court which reviews his decisions. He should be *especially* protected from interference in the performance of his duties by appellate judges.

This applies to the administrative work of his court as well as to the trial and decision of cases. Judicial independence means and requires not only freedom from control by sources outside the judiciary but *especially* means and *requires* freedom from control or supervision by sources *within* the judiciary. A judge whose administrative decisions can be supervised is not an independent judge. The administrative duties of a trial judge are a *vital* and integral part of his function in the judicial process and *directly* affect the resulting end product, his final judicial decisions.

Interference by an appellate court at the trial level reduces the judge to a mere trial examiner and does away with the necessity for the appellate court. If appellate judges are permitted to *step down* to the trial level during

the trial process and exercise the discretionary functions of trial judges, the appellate function and purpose is at least seriously impaired, and the independence of the trial judge is completely destroyed.

The right to discredit and abuse a trial judge has now become settled law in the Tenth Circuit. The picture is very clear. The tyranny exhibited here strikes fear to the hearts of all trial judges, especially those who know they will refuse to be intimidated by character assassination. That such usurpation of power is not new in the world, brings to mind the thought "What meat does this our Caesar eat that he has grown so strong?"

It is too late to nip the evil in the bud. Great damage has already resulted. But this Court by its decision in this case has the power to restore the American birthright to the citizens of six states.

Judge Magruder of the First Circuit stated:

> "Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C. § 1651 [the All-Writs Act] grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit . . ." *In re MacNeil Bros. Co.*, 259 F.2d 386, 387.

This is in direct contrast to the pronouncement of Chief Judge Murrah made and assented to by the other judges in *Occidental:*

> "We are not just sitting here to decide the legal sufficiency of an affidavit to d squalify a trial judge. We are sitting here in the exercise of our supervisory powers as a court . . ." (Respondent's Brief, p. 11)

Three days of testimony were taken in *Occidental.* Certainly these words of the Chief Judge of that court are at odds with earlier utterances of this Court, to wit:

> "e.g., *Whitney v. Dick,* 202 U.S. 132, 137 ('It will be borne in mind that the circuit court of appeals,

> which is a court created by statute . . . is not in terms endowed with any original jurisdiction. It is only a court of appeal'); *Ex parte Bollman*, 4 Cranch 75, 93 ('. . . [C]ourts which originate in the common law possess a jurisdiction which must be regulated by their common law . . . but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.'); *Kentucky v. Powers*, 201 U.S. 1, 24 ('We say . . . the subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and crimi[illegible]s may be authorized by acts of Congress.')"

Serious and recurrent problems of judicial policy are graphically raised and ripe for adjudication by this court. The judges of the Court of Appeals and Judicial Council of the Tenth Circuit have "legislated" themselves limitless jurisdiction to do "anything we want to do" in violation of the division of powers concept of the Constitution and all American principles of judicial propriety. By their defense here they ask this Court to side-step decision of the compelling issues and thereby indirectly approve their tyrannical usurpation of power.

Respondent asks leave to file this further expression in behalf of the maintenance of the great principles of the *rule of law* upon which our government is based. To legalize the power exercised would require Constitutional amendment and legislation by Congress.

To supervise or defame another judge is not a proper nor acceptable judicial function. If a judge is corrupt, impeachment and the criminal laws are available. 18 U.S.C. 201. If he is not corrupt his fitness in other respects is not a justiciable issue under our Constitution.

Neither the Judicial Conference of the United States nor the Judicial Councils of the Circuits can legally or constitutionally supervise any judge or Court whether it is called "housekeeping" or "housecleaning."

Power is not safe in the hands of those who would abuse it. Judicial abuse of power is *defiance* of law in its most malignant form. The shame and indignity of personal injustice is as nothing compared to the terrible blow to public respect for the judiciary occasioned by the intemperate use of the Extraordinary Writs referred to which substitute the will of men who take the law into their own hands for the rule of law.

The fearless incorruptible United States District Judges of the past, by reason of their independence, were able to mete out justice at the trial leve. They were the glory of America. The decision in this case can restore the rule of law.

Respectfully submitted,

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United States District Judge,
Petitioner, *Pro Se*